Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1845

PIETRO CASTAGNA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pietro Castagna, petitioner, respectfully moves this Court to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit which was entered in this proceeding on April 21, 1980.

OPINION BELOW

The as yet unpublished Opinion of the Court of Appeals addressed issues raised by a total of six (6) appellants. Appendix A includes only those portions of the Opinion which address issues raised by the petitioner.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 21, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the conviction of the Petitioner, Castagna, of extortion under 18 U.S.C. § 1951 must be reversed because there was no legally sufficient evidence that property was obtained by the wrongfully use of acts or threaten force or fear or under color of official right.

STATUTORY PROVISIONS INVOLVED

Federal Extortion Statute 18 U.S.C. § 1951

Interference with commerce by threats or violence

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent,

induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of title 29 or sections 151-188 of Title 45.

STATEMENT OF THE CASE

On January 24, 1977, the Grand Jury for the United States District Court for the District of Maryland returned a forty-eight (48) count indictment charging Ottavio F. Grande, Gerald W. "Buzz" Berg, Andrew Hawthorne, Edgar Hawthorne, Joseph Tuller, and Pietro Castagna, among others, with various federal criminal offenses arising out of an alleged scheme of collusive bidding in effect from approximately January 1, 1968 through July 2, 1976. Most of the bids concerned contracts of the Department of Housing and Community Development of the City of Baltimore.[1]

[1] Specifically, counts one (1) through twenty-eight (28) of the indictment alleged that defendants Grande, Berg, Tuller, A. Hawthorne and E. Hawthorne violated the federal mail fraud statute, 18 U.S.C. § 1341, as well as the aider and abetor statute, 18 U.S.C. § 2, while acting in conjunction with several named but unindicted individuals, in an effort to control the award of competitively-let demolition contracts in the City. (These defendants were not charged in each count however.) Counts eleven (11) and thirteen (13) were predicated upon demolition contracts let by the Interstate Division of the City of Baltimore (a combined State and municipal agency), while count sixteen (16) was predicated upon a contract awarded by a private entity, the

Trial by jury, with Chief Judge Edward S. Northrop presiding, commenced, September 26, 1977 and continued through October 18, 1977, at which time the jury returned a verdict of guilty as to all defendants with

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Baltimore Gas and Electric Company. The remaining counts brought under the mail fraud statute related to demolition contracts awarded by the Department of Housing and Community Development of the City of Baltimore.

Counts twenty-nine (29) through thirty-one (31) of the indictment charged three of the demolition contractors (Berg, Tuller and Hawthorne) with having engaged in a pattern of racketeering activity, *i.e.*, mail fraud, in violation of 18 U.S.C. §§ 1961, 1962 (c) and 1963, and called for the forfeiture of the interests of the individual defendants in these respective companies upon conviction.

Counts thirty-two (32), thirty-three (33), thirty-five (35) and thirty-six (36) charged defendant Grande with obstructing, delaying and/or affecting commerce by means of extortion (*i.e.*, the wrongful use of fear of financial and economic injury and/or color of official right) to obtain sums of money from Harford Contracting Company, Inc., and Roland Larkin, in violation of 18 U.S.C. § 1951. Counts thirty-four (34), thirty-seven (37) and thirty-eight (38) charged the defendants Grande and Castagna with committing similar offenses by acting jointly, also in violation of 18 U.S.C. § 1951.

Counts thirty-nine (39) and forty (40) of the indictment charged defendants Grande and Berg with obstructing a criminal investigation in violation of 18 U.S.C. § 1510. Count thirty-nine (39) alleged that defendant Grande resorted to bribery in his attempt to obstruct, delay and prevent Roland Larkin from communicating information relating to the violation of the federal criminal laws to agents of the Federal Bureau of Investigation, in violation of 18 U.S.C. § 1510. Count Forth (40) accused defendant Berg of endeavoring through intimidation and threats of force to prevent Charles Edward Collision from relaying similar information to agents of the Federal Bureau of Investigation, also contrary to 18 U.S.C. § 1510.

The charges contained in counts forty-one (41) through forty-eight (48) of the indictment involved alleged violation of the federal income tax laws by defendant Grande, in contravention of 26 U.S.C. § 7201 and § 7206(1). (Counts forty-one (41) through forty-four (44) charged Grande with attempting to evade and defeat a large part of the income tax due and owing by him owing by him and his wife for the calendar years 1971 through 1974, and counts forty-five (45) through forty-eight (48) averred that defendant Grande had subscribed to a false income tax return for each of those years.)

respect to each of the forty-five (45) counts[2] which had been submitted to them.

Motions for judgment of acquittal or, alternatively, for new trial were filed on behalf of the defendants, and were heard and considered by Chief Judge Northrop immediately prior to sentencing on December 28, 1977. After oral argument by counsel, the post-trial motions were denied and the defendants were sentenced.

Timely notices of appeal to the United States Court of Appeals for the Fourth Circuit were filed in the United States District Court for the District of Maryland by all Defendants. Joseph Tuller subsequently withdrew his appeal.

On April 21, 1980 the Fourth Circuit decided the appeals and concluded that there was sufficient evidence to sustain the convictions of Castagna and Grande for Hobbs Act violation. It is from that decision that this Writ of Certiorari is being requested.

REASON FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS IN THE INSTANT CASE IS INCONSISTENT WITH DECISIONS OF OTHER FEDERAL COURTS, REVIEW BY THIS COURT IS NECESSARY TO RESOLVE THE CONTRADICTIONS.

The opinion of the Court of Appeals in instant case is directly contradictory to that reached in *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), which concerns three (3) separate schemes of extortion by Richard Rabbitt, former speaker of the Missouri House of Representatives. In upholding two (2) convictions of extortion but reversing the third, the United States Court of Appeals for the Eighth Circuit held that not all payments to a public official for

[2] Three counts of the indictment, numbers seventeen (17), twenty-three (23), and twenty-eight (28), had been withdrawn from the jury's consideration at the close of the prosecution's case.

illegal purposes constitutes an extortion under "color of official right". This holding conflicts with the holding of the Fourth Circuit in the instant case.

An examination of each of the three (3) separate schemes and the Eight Circuit's conclusion upon reviewing them is recessing before examining the opinion of the Fourth Circuit.

With regard to the first scheme, Rabbitt was indicted on one (1) count of mail fraud and two (2) counts of extortion. The evidence showed that the Missouri State Automobile Dealer Association made a concerted effort to have Senate Bill 110 (S.B. 110)[3] passed during the 1973 Legislative Session of the Missouri House of Representatives. Once the Senate passed the Bill, Rabbitt (in his capacity as Speaker) assigned the Bill to the Local Government Related Matters Committee, a committee whose members were generally favorable to the bill and which was chaired by a personal friend of Rabbitt. Rabbitt was then approached by Gene Warren, legislative liaison of the Automobile Dealers Association, who asked what could be done to expedite the passage of the bill. Rabbitt suggested the Association obtain additional counsel and recommended his close friend, John Connaghan.

Warren duly contacted Connaghan who agreed to speak with Rabbitt about the bill upon the association's payment of a non-negotiable fee of twenty-thousand dollars ($20,000). Warren believed it was wise to follow the speaker's advice on getting legislation passed, and paid the fee. The second scheme also involved the 1973 Legislative Session and resulted in a one count indictment for attempted extortion. George Burrus, a lobbyist for the Missouri Bus and Truck Association visited Rabbitt in an effort to get House Bill 1336[4] passed. Rabbitt made a

[3] S.B.110 proposed a change in the *ad valorem* method of taxation for car dealers inventory.

[4] This bill sought to increase the permissible weight of trucks on the Missouri Highways.

comment that his law firm needed some new legal work. Later, in mid-January, 1974, Burrus again asked Rabbitt why H.B. 1336 had not been sent to the committee. Rabbitt responded, "Because I haven't got any law business yet." The legislation was ultimately buried in committee.

The third scheme from which Rabbitt was indicted occurred in 1965 when a Paul Hurily approached Rabbitt on behalf of an architectural firm and sought help in securing work on state construction jobs. Rabbitt, who was then a member of the Missouri House of Representatives agreed to introduce the firm to people who might be able to secure contracts upon the payment of a ten per cent (10%) fee.

Rabbitt was ultimately paid funds for several jobs ultimately procured.

In comparing the decisions in Rabbitt to the decision in the instant case, one first must look to the basis for which the Fourth Circuit found Grande and Castagna guilty of extortion under the Hobbs Act. The Fourth Circuit held that

> "even though Grande did not threaten Collison or Larkin or otherwise put them in fear, however, we think He did obtain money from them under color of official right because he held public office and it must of been apparent to Collison and Larkin that he misused that office in favor of them. Nothing more is required to support a conviction under 18 U.S.C. § 1951.

On appeal to the Eight Circuit, Rabbitt asserted that the Government failed to prove that he compelled his "victim" to part with money either out of fear or "under color of official right" the Government disagreed. The Eight Circuit analyzed the evidence and law as follows.

1. Fear.

The Government alleges extortion by fear of economic injury. Fear of economic loss is sufficient to constitute extortion, *see Callanan v. United States*, 223 F.2d 171, 175-76 (8th Cir.). *cert. denied*, 350 U.S. 862, 76 S. Ct. 102, 100 L. Ed. 764 (1955); *Bianchi v. United States*, 219 F.2d 182 (8th Cir.), *cert. denied*, 349 U.S. 915, 75 S. Ct. 604, 99 L. Ed. 1249 (1955), even if the interest threatened is only an anticipated one. *See United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936, 92 S. Ct. 949, 30 L. Ed. 2d 812 (1972).

The record lacks any substantial evidence of "fear" as a basis for the Berger-Field payments to Rabbitt. (footnote omitted) Neither did the firm believe that state contracts could not be acquired without Rabbitt's introduction. Indeed, evidence indicated Berger-Field had secured state contracts prior to its agreement with Rabbitt and acquired other state contracts during the years here in question without Rabbitt's assistance. The evidence further indicates Berger-Field was a willing collaborator who sought and paid for Rabbitt's good words to influential people, thus giving Berger-Field access on a friendly basis to state officials who awarded architectural contracts on merit. The principals of Berger-Field all expressed anger, not fear, at hearing of Rabbitt's ten percent demand. One associate described the demand as "poor thanks" after their consistent political contributions and support. Nevertheless, they decided to pay.

2. Under Color of Official Right.

Extortion "under color of official right" incorporates common law extortion, the taking of money by a public official not due him or his office for the performance or nonperformance of an official function. The term includes the misuse of one's office to induce payments not due the person or his office. *United States v. Hathaway, supra*, 534 F.2d at 394. The

official need not control the function in question if the extorted party possesses a reasonable belief in the official's powers. *See United States v. Hathaway, supra*, 534 F.2d 386; *United States v. Mazzei, supra*, 521 F.2d 639; *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S. Ct. 1561, 1562, 43 L. Ed. 2d 775 (1975). (footnote omitted)

In the present case, the Government does not contend that Rabbitt possessed actual power to award contracts for architectural services within his legislative powers or that Rabbitt so intimated. The Government argues that Rabbitt possessed the apparent power to award contracts and that Berger-Field believed in Rabbitt's power to secure contracts for the firm. The evidence, however, does not support that argument. All the principals of Berger-Field knew Rabbitt did not award contracts in his official capacity. Each architect knew the most Rabbitt could do was recommend them to state contractors as qualified architects and thereby gain them a friendly ear. Moreover, while Rabbitt's influence obviously helped these architects obtain state jobs, no testimony established that any state contracting officer awarded any contract to Berger-Field because of Rabbitt's influence or that Berger-Field believed Rabbitt's introduction was enough to secure the work. The Government failed to prove Berger-Field entertained a reasonable belief Rabbitt possessed effective control over the award of architectural contracts necessary to establish extortion "under color of official right" in violation of the Hobbs Act. (footnote omitted).

The evidence received on this count is distinguishable from that on the S.B. 110-Hobbs Act counts. Control over legislation such as S.B. 110-Hobbs Act counts. Control over legislation such as S.B. 110 was at the heart of Rabbit's responsibility in his position as a legislator and House Speaker. We hold Rabbitt's motion for judgment of acquittal on Hobbs Act count XI should have been granted. Accordingly, we reverse his conviction on this count.

As in Rabbitt, where the victim lacked the requisite belief that Rabbitt possessed effective control over the award of architectural contracts necessary to establish extortion", no one believed Grande had the power to award contracts here. Contracts were awarded by sealed bids. Several of the witnesses' testimony indicated that the conspiracy failed when contracts were low bid by people outside of the group, or by a member of the group who had not been assigned the jobs. Indeed, Charles Collison, an unindicted co-conspirator and Government witness testified as follows:

> Q. Look in the file, Mr. Collison. And who, if you know, put that job out? A. It was an Interstate job.
>
> Q. Mr. Collison, tell the ladies and gentlemen of the jury what you mean by Interstate job, just briefly? A. Interstate was a plan of the City of Baltimore and States Road commission to put these superhighways or the Interstate system through Baltimore.
>
> Q. Do you recognize Exhibit 65 that you are holding in your hand? Do you recognize that job? A. Yes, sir.
>
> Q. What was that job all about? A. This was a job that never actually went through. It was a breakdown for all the Interstate work left in East Baltimore, after three or four contracts had been given out.
>
> Q. Mr. Collison, what, if anything, unusual, happened with regard to that particular job? A. This particular job, four wreckers being General Wrecking, State Wrecking, Harford Contracting, met and drew lots on who was to get the job.
>
> Q. You say four of you met? A. Yes, sir.
>
> Q. The first one you mentioned was General Wrecking. Which individuals, if any, from General Wrecking met with you? A. As I remember, it was Julius Hoffman and Harry Hoffman.

Q. And where did this meeting take place? A. General Wrecking Company's office on Ordance Road.

Q. Ordnance Road? A. Yes, sir.

Q. Would you tell the ladies and gentlemen of the jury what happened at that meeting? A. Well, at that meeting, we decided to bid the job, so somebody could make money out of it. And as I said, we drew lots, and General Wrecking drew the lot for the low bid.

At that time, there was Frank Julian bidding with Charles J. Spielman Company, and they suggested that — by "them", I mean the wreckers, suggested that we try to buy Spielman off for not bidding on the job.

I knew Mr. Spielman, and I called him and told him we would give him $5,000 not to bid on the job.

He accepted the $5,000.

Q. And who did Mr. Spielman receive the $5,000 from? Who gave him the money? A. I did.

Q. What form did you give him the money in? A. In cash.

Q. Where did you get the money that you gave him? A. $1,250 came out of the scrap sales.

Q. Where did you get the rest of the money from? A. Each of the other contractors contributed $1,250.

Q. And you personally delivered this money? A. Yes, sir, I did.

Q. Who were the other contractors who paid $1,250? General Wrecking, State Wrecking, Roland Larkin.

Q. Now, for what purpose were you delivering this money to Mr. Spielman? A. So he would not bid on the Interstate job in East Baltimore.

Q. Now, did you bid that job? A. Yes, sir.

Q. How did you know what to bid? A. It was agreed beforehand that we would bid over a certain price that was set, whatever the price was set.

Q. Who set the price? A. Jointly on that job, the four of us.

Q. Did Mr. Spielman do that too? A. No, sir.

Q. How, was the low bidder awarded that job? A. No, sir.

Q. What happened? A. The bid on the I-70 job came in too high, and they threw both jobs out, and readvertised smaller units.

Q. Well, this job we have been talking about was not an I-70 job? A. That was an I-95.

Similarly, Mr. Collison testified that before the Hawthornes allegedly joined the conspiracy, the Hawthornes were under bidding everyone. This dilemma left the conspirators with little choice but to invite the Hawthornes into the conspiracy so and that they could get their prices up; there was no purpose in agreeing on a higher price when the Hawthornes were prepared to under bid it. The frustration and resolve of the conspirators were also explained by Mr. Collison:

We each took one block to bid on, as cheap as we could, to see if we could underbid the Hawthorne Company.

Q. Did you cut your costs to the bone on that job? A. Yes, sir.

Q. What about Mr. Larkin? A. I presume that he did too.

Q. When the bids were opened, who was the low bidder? A. Robert Hawthorne Company.

Q. On both jobs? A. Both jobs.

Q. Do you r[illegible]all what they did? A. They bid the same on each job, but I don't remember exactly what it was.

Q. Mr. Collison, after those bids were opened and Robert Hawthorne was low, what if anything did you do? A. Well, after a period of time, let's say the local wreckers decided that the only way that we could do it was to try to take the Robert Hawthorne Company into the group.

I approached Mr. Andrew Hawthorne, and he said that he would have to talk to his — well, I don't know if he said his Aunt May or Uncle Ed, but he would get back to me.

Q. You say that local wreckers decided and who did? A. That would be General, State, Larkin and myself.

Q. At another one of these meetings? A. Yes, sir.

Q. When you approached Mr. Hawthorne, you said what? A. He would have to—

(Mr. Greenberg) Objection.

(Mr. Smouse) Object, Your Honor. He already has received an answer on that. He has gone over this once.

(Mr. Greenberg) It's repetitive.

By Mr. Martin:

Q. Which Mr. Hawthorne did you approach? A. Andrew Hawthorne.

Q. What did he say? A. He said that he would have to talk to, I am not sure, Aunt Mary or Uncle Ed.

Q. After that, what happened? A. After a short period of time, he came back and said that he would be willing to sit down with us and talk about the work.

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This evidence concerning how the conspiracy was thwarted is undisputed. Most importantly, there was no testimony that anyone expected Grande to take a job away

from the low bidder, or put pressure on any one to not bid. This does not constitute extortion.

The Fourth Circuit also found that Grande was supplying cost dollar on bids, and evaluated bids and recommended awards. None of these services brings the facts within an extortion. The wreckers as well as Grande computed the cost dollar on bids. His evaluations and recommendations did not stop anyone from bidding.

If these facts render Grande guilty of anything the crime is bribery or as a co-conspirator and aider in the mail fraud. In fact, Grande was convicted of mail fraud along with the various contractors.

The petitioner does not contend that bribery and extortion are mutually exclusive. Most extortions also include a bribery, however, every bribe is not necessary an extortion. The distinction as applied in this case lies in the determination as to whether the thing requested by the contractor was something that he would have been entitled to regardless of whether or not he paid the bribe or whether he felt he must pay the money in order to get any contracts. Because the contractors did not pay Grande to get what they were entitled to or out of fear that someone else could pay Grande, but because the contractors paid Grande to turn his back on their conspiracy and to decline to withhold awarding contracts when the prices became excessive, there was no extortion here.

In contrast to these facts is the case of a citizen who is terrorized by a police officer into paying money out of fear of false arrest. This is extortion. But a payment to an officer to clear up a traffic ticket is a bribe and not extortion. The distinction lies with who initiated the payment, and the purpose for the payment. If the purpose is to get the officer to do what he is legally obligated to do and he is holding out to the detriment of the victim, either

impliedly or expressly, the extortion is proven. If the purpose is to stop an officer from overly zealously performing his duties, extortion is proven. But if a group of contractors try to fix bids to the detriment of a public and brings a public official into the group to buy his silence and to insure their success, these contractors are not victims of any crimes but the planners and perpetrators of the crime. The public officer may be party to the crime but should not be found guilty of extorting his own payoff.

Furthermore, instant case is clearly distinguishable from each of the cases relyed on by the Fourth Circuit.

In the *United States v. Kenny*, 462 F.2d 1205 (3d Cir. 1972), the indictment charged Kenny and other county officials with conspiracy to obstruct commerce by obtaining from businessmen a percentage of the contract price in return for the privilege of doing business with the local government of Jersey City or Hudson County. The businessmen either paid or failed to get contracts. However, in the instant case, Grande wasn't being paid to get contracts. Anyone could bid a contract, which was awarded to the low bidder. What our "victims" were buying was Grande's silence while they raped the public.

In *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), police officers of a vice squad harassed bars, taverns and liquor establishments through their official positions by making unusual premise checks. Clearly what the officers were after was protection payments. In contrast, Grande did nothing to initiate any of the payments, in fact, he was asked to join the conspiracy to get prices up and not to stop any harassment technique.

Finally, in the case *United States v. Price*, 507 F.2d 1349 (4th Cir. 1974) the issue was whether Price (who was County Counsel Chairman) extorted monies "under color of official right" when he received twelve thousand dollars

($12,000) for the issuance of an occupany permit. Price asserted that because he was County Counsel Chairman, and had no de jure power to issue occupancy permits, the money was not obtained "under color of official right." The Fourth Circuit stated that "we reject Price's contention that guilt may be predicated only upon a further finding that he prevented the legal or statutory [de jure] power of his public office. It is enough that he appeared to act under § 1951(b)(2)'s "color of official right". In the instant case, Grande did not have power to grant contracts and none of the contractors ever believed that he had such a power. The instant case is similar to Rabbitt in that all the parties knew that the public official had no power to award any contracts.

CONCLUSION

For the foregoing reasons, the petitioner requests this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
for the Fourth Circuit

No. 78-5056

United States of America,
Appellee,

v.

Ottavio F. Grande,
Appellant.

No. 78-5057

United States of America,
Appellee,

v.

Gerald W. Berg, a/k/a
Buzz Berg,
Appellant.

No. 78-5058

United States of America,
Appellee,

v.

Andrew Hawthorne,
Appellant.

No. 78-5059

United States of America,

Appellee,

v.

Edgar Hawthorne,

No. 78-5060

United States of America,

Appellee,

v.

Joseph Tuller,

Appellant.

No. 78-5061

United States of America,

Appellee,

v.

Pietro Castagna, a/k/a
Peter Castagna,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief Judge.

Argued October 4, 1979 *Decided April 21, 1980*

Before WINTER and RUSSELL, Circuit Judges, and FIELD, Senior Circuit Judge.

Eugene Gressman, School of Law, University of North Carolina for Appellants; Ransome J. Davis (H. Russell Smouse on brief) for Appellant Andrew Hawthorne; Wilbur Greenberg for Appellant Edgar Hawthorne; Henry Belsky (Jana R. Barnett on brief) for Appellant Pietro Castagna; (Michael E. Marr on brief) for Appellant Ottavio F. Grande; David D. Queen, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney on brief) for Appellee.

WINTER, Circuit Judge:

The appealing defendants, four demolition contractors and a former director of the Baltimore City department who was responsible for preparing, advertising, evaluating and supervising the City's demolition contracts, were all convicted on forty-five counts of a forty-eight count indictment charging them with various criminal offenses arising out of a scheme of collusive bidding on demolition contracts in Baltimore City.[1] The demolition contracts which were the object of collusive bidding were principally those let by the Department of Housing and Community Development between 1971 and 1975. The appellants raise twelve principal contentions applicable to some or all of them.

We affirm in part and reverse in part and remand for further proceedings.

I.

Viewed in the light most favorable to the government, the evidence showed that within the period January 1968 to July 1976, there was intense redevelopment in Balti-

[1] Three counts were withdrawn from the jury at the close of the government's case. Joseph Tuller, one of the demolition contractor defendants who was convicted, did not appeal.

more City, and demolition of outmoded and unusable buildings was a frequent occurrence. Virtually all demolition was done by private contractors at municipal expense through contracts let by the Department of Housing and Community Development, Division of Construction and Building Maintenance, of which defendant Ottavio F. Grande, was director. Grande's division prepared demolition contracts, fixed the specifications contained therein, evaluated bids, made recommendations for awards and supervised performance of the contracts once an award was made. Under city law, awards were made by the city's Board of Estimates to the lowest responsible bidder as a result of competitive bidding, after public advertisement for bids. With respect to some "emergency" demolition contracts, *e.g.*, demolition to eliminate dangerous conditions resulting from fires, competitive informal bidding was used, with the award made by Grande to the lower bidder.

Dissatisfied with their margin of profit on contracts obtained by competitive bidding, the contractors who historically had done the city's demolition and wrecking work devised a scheme to ensure them a greater profit. Initially the group consisted of defendant Gerald W. "Buzz" Berg (Buzz Berg Wrecking Company), defendant Joseph Tuller (State Wrecking Company of Maryland), Charles E. Collison (Harford Contracting Company), Roland Larkin (Roland Larkin, Inc.), Julius Hoffman and Harry Milzman (Harry Hoffman & Sons, Inc.), C. Gordon Spielman (Charles J. Spielman, Inc.), and defendant Pietro Castagna (Castle Construction Company.[2] The conspiracy was later joined by defendants Andrew Hawthorne and Edgar Hawthorne (Robert L. Hawthorne, Inc.), who were Philadelphia contractors who desired to get Baltimore business.

The scheme was a simple one. Through information supplied by Grande as to the city's cost estimate on a

[2] Collison, Larkin, Hoffman, Milzman and Spielman were not indicted, and at trial they testified as government witnesses.

contemplated project, the group could determine the maximum bid that could be made without causing all bids to be rejected and the project readvertised. With that knowledge, the members of the group would assign themselves turns to submit the "low" bid, with the other bidders either not bidding or bidding a higher amount. Grande was paid approximately five percent of each contract for which an award was obtained pursuant to the scheme.

Counts one through twenty-eight charged violations of mail fraud against Grande, Berg, Tuller and the Hawthornes Counts twenty-nine through thirty-one charged Berg, Tuller and Andrew Hawthorne with being engaged in a pattern of racketeering activity and called for the forfeiture of their interests in their respective companies upon conviction of the charges against them. Counts thirty-two, thirty-three, thirty-five and thirty-six charged Grande with affecting interstate commerce by means of extortion from Larkin and Harford Contracting Company, Inc., and similar offenses were charged against Grande and Castagna jointly in counts thirty-four, thirty-seven and thirty-eight. Grande was charged with obstruction of justice by bribery in count thirty-nine and Berg with obstruction of justice by intimidation and threats of force in count forty. Finally, counts forty-one through forty-eight charged Grande with various income tax violations with respect to the sums paid him under the scheme to obtain contracts.

Other facts necessary to an understanding of the various contentions advanced by the defendants will be stated in the discussion of the contention to which they relate.

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E. Among numerous other convictions, defendant Grande was convicted of three violations of the Hobbs Act, 18 U.S.C. § 1951 (obstructing commerce by obtaining money wrongfully under color of official right). Defendant Castagna was charged and convicted of aiding and abet-

ting Grande in these offenses. Both Castagna and Grande contend that the evidence was not legally sufficient to convict them. A large part of this contention is that they could not be convicted of violating § 1951 because the proof was legally insufficient to show that they acted under "color of official right" and there was no evidence that Collison of Harford Contracting Company, Inc., or Larkin of Robert Larkin, Inc., from whom money was allegedly extorted, feared either of them.

There is no merit in this contention. The proof showed that money was paid by both Collison and Larkin to Grande and that Castagna was the conduit for payment. We think the evidence sufficient for the jury to find that payment was made to Grande for his supplying cost data on bids and his services in evaluating bids and recommending awards. Even though Grande did not threaten Collison or Larkin, or otherwise put them in fear, we think that he did obtain money from them "under color of official right" because he held public office and it must have been apparent to Collison and Larkin that he misused that office to favor them. Nothing more is required to support a conviction under 18 U.S.C. § 1951. *See* United States v. Price, 507 F.2d 1349 (4 Cir. 1974); United States v. Braasch, 505 F.2d 139 (7 Cir. 1974); United States v. Kenny, 462 F.2d 1205 (3 Cir. 1972). Although Castagna held no public office, the proof showed that he was properly convicted as an aider and abettor to Grande under 18 U.S.C. § 2. Indeed, on one occasion when Grande demanded payment from Collison at a time when Collison lacked the requisite cash, Grande arranged for Castagna to pick up a check the next day.

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